

**FILED**

JUL 16 2012

BEFORE THE  
DISCIPLINARY BOARD OF THE  
WASHINGTON STATE BAR ASSOCIATION

**DISCIPLINARY BOARD**

In re  
**JOE WICKERSHAM,**  
Lawyer (WSBA No. 18816)

Proceeding No. 11#00010  
DISCIPLINARY BOARD ORDER  
AMENDING HEARING OFFICER'S  
DECISION

This matter came before the Disciplinary Board at its July 6, 2012 meeting, on automatic review of Hearing Officer Lish Whitson's December 29, 2011 Findings of Fact and Conclusions of Law And Hearing Officer's Recommendation. Mr. Whitson found that all seven charged counts were proven by a clear preponderance of the evidence. He recommended disbarment, restitution and a fitness to practice exam prior to reinstatement.

The Board reviews the hearing officer's finding of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC 11.12(b)<sup>1</sup>.

Having reviewed the materials submitted by the parties, heard oral argument, and considered the applicable case law and rules;

**IT IS HEREBY ORDERED THAT** the Hearing Officer's decision is adopted with the following amendments:<sup>2</sup>

<sup>1</sup> On May 30, 2012, Disciplinary Counsel filed an objection to Respondent's designation of exhibits that were not offered for admission during the hearing (R-1, R3, R-5, R-7, R-10, R-12, R-14, R-15, R-16, R-17, R-18, R-19, R-22, R-24 and R-25; and one rejected exhibit R-6. Respondent did file a response to this Motion. ELC 11.12(b) prohibits the Board from considering evidence not presented to the hearing officer. These exhibits are not part of the record and were not provided to the Board. Exhibit R-8 was admitted and was provided to the Board.

<sup>2</sup> The vote on this matter was unanimous. Those voting were Bray, Broom, Butterworth, Carrington, Coy, Evans, Ivarinen, Kaba, Neiland, Ogura, Trippett, Waite and Wilson.

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1 (1) All factual findings based on EX 118 are stricken and all conclusions of law relating to  
2 Mr. Ballard are reversed.

3 (2) The recommended sanction is reduced to a three year suspension. The aggravating factor  
4 of pattern of misconduct is stricken. The mitigating factor of personal or emotional  
5 problems is added. The restitution and fitness to practice exam requirements are  
6 unchanged.

7 (3) The Board carefully considered the appearance of fairness issue related to the hearing  
8 officer's prior representation of Respondent, and affirms the CHO decision on that issue.

#### 9 RAY BALLARD ALLEGATIONS

10 The Hearing Officer admitted Mr. Ballard's grievance form, Exhibit A-118, for the  
11 limited purpose of showing that the grievance was filed. (TR 257, l. 18-258 l. 4) The Hearing  
12 Officer clarified that "it will not be viewed as testimony or evidence." (TR 259 l. 3) Mr. Ballard  
13 did not testify at the hearing, despite being subpoenaed by both parties. The Hearing Officer  
14 then used the content of Mr. Ballard's grievance to make factual findings. (See e.g. FOF 44, .46  
15 and 47) The Association conceded at oral argument that this use of the grievance content was  
16 inappropriate. The factual findings citing facts from Mr. Ballard's grievance form must be  
17 stricken.

The record contains the following facts regarding Mr. Ballard. Mr. Ballard contacted  
respondent between June 10 and 12, 2010. (TR 243-44) Mr. Ballard met with Carter  
Wickersham on June 17, 2010 at Respondent's office. (TR 244-5) Mr. Ballard paid \$2,700 for  
Respondent's "retainer" and costs for the Department of Licensing implied consent hearing. (TR  
245) Respondent sent the request for an implied consent hearing, along with the \$200 fee. (TR  
246-7) During a phone conversation on August 16 or 17<sup>th</sup>, Respondent believed he was fired,  
because Mr. Ballard stated that he was going to find another lawyer. (TR 248) On August 17,  
2010, Mr. Ballard was charged with DUI. (EX 117) Respondent was out of town and away from  
his office from August 23, 2010 until mid-September, 2010. (TR 252) Mr. Ballard appeared

1 with counsel for his August 26, 2010 arraignment. (EX A-117) Respondent first sent Mr.  
2 Ballard a refund of his fee on October 14, 2010. (EX A-121)

3 The record does not contain evidence that Respondent abruptly withdrew from Mr.  
4 Ballard's case (Count 2), missed any scheduled court appearances during the Ballard  
5 representation (Count 1) or failed to do "any work" for Mr. Ballard (Count 3). All findings of  
6 fact based on the substantive content of Exhibit 118 are stricken. All conclusions of law relating  
7 to Mr. Ballard are stricken.

8 The remaining Findings of Fact and Conclusions of Law are adopted.

9 SANCTION ANALYSIS

10 Presumptive Sanction

11 The sanction determination is a two-part process, using the ABA Standards for Imposing Lawyer  
12 Sanctions (1991 & Supp. 1992) as a basic, but flexible, guide. See e.g., In re Eugster, 166 Wn.2d  
13 293, 314, 209 P.3d 435 (2009). First, the presumptive sanction is determined based on the  
14 ethical duty violated, respondent's state of mind and the harm caused by the misconduct. Next,  
15 a decision is made whether to modify the presumptive sanction based on aggravating and  
16 mitigation factors. No one factor is controlling. The Court examines the misconduct as a whole  
17 and in context. Id at 316.

When multiple ethical violations are found, the sanction imposed should at least be consistent  
with the sanction for the most serious instance of misconduct. In re Petersen, 120 Wn.2d 833,  
854, 846 P.2d (1993) The most serious presumptive sanction is disbarment for Count 7. The  
Hearing Officer found that ABA Standard 4.41 applied to this violation. The Board specifically  
finds that *ABA Standard 4.41(c)* does not apply, because the record does not establish a pattern  
of neglect. Two instances of neglect arising from one period of mental disability or emotional  
problems do not establish a pattern. Standard 4.41(a) applies because Respondent abandoned his  
practice causing injury to two clients and potentially serious injury to others. The presumptive

1 sanction is disbarment.<sup>3</sup>

2 Aggravating and Mitigating Factors

3 *Pattern of Misconduct*

4 The Hearing Officer found four aggravating factors: prior disciplinary offense, pattern of  
5 misconduct, multiple offenses and substantial experience in the practice of law; and no  
6 mitigating factors. The Board finds that removal of the Ballard conclusions requires removal of  
7 the pattern of misconduct aggravator. A pattern is not established by misconduct in two client  
8 matters related in time to one event in Respondent's life.

9 *Personal or Emotional Problems*

10 The Board agrees with the Hearing Officer that the available mental health evidence does not  
11 establish all four requirements for the ABA Standard 9.32(i) mental disability or chemical  
12 dependency mitigator. However, it appears the hearing officer did not consider the mitigator of  
13 personal or emotional problems. ABA Standard 9.32(c) The hearing officer found that  
14 Respondent's licensed mental health counselor diagnosed Respondent with mood disorder, very  
15 likely major depressive disorder, and PTSD. (FOF 93) The hearing officer also found that "there  
16 is medical evidence that the respondent is affected by a chemical dependency and/or mental  
17 disability and that the chemical dependency and/or mental disability contributed to the  
18 misconduct. (FOF 112) The Commentary to ABA Standard 9.32 states, in pertinent part:

Cases concerning personal and emotional problems as mitigating factors include a wide range of difficulties, most often involving marital or financial problems. The two factors which have been treated most inconsistently by the courts are mental disability or impairment and chemical dependency. . . .Issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offence, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great

3 Count 3 is stricken. The Board agrees with the hearing officer that the presumptive sanction for Counts 1, 2, 4 and 5 is suspension, and the presumptive sanction for Count 6 is reprimand.

1 weight. In all other cases in which the disability or chemical dependency  
2 is considered as mitigating, it should be given little weight. A showing of  
3 rehabilitation from chemical dependency may be considered but should  
4 not in and of itself, be a justification for a recommendation for discipline  
5 less than that which would have been imposed upon an attorney in similar  
6 circumstances where a chemical dependency was not present.

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Commentary at pages 51-52.

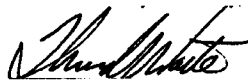
The Board finds that the mitigator of personal or emotional problems applies.

Sanction Recommendation

The Board recommends that the Court impose a 3-year suspension with the restitution and fitness to practice conditions stated in the hearing officer's decision. The Board believes that Respondent is working to ensure that his misconduct will not be repeated. Respondent's personal and emotional circumstances and the steps he is taking to prevent recurrence justify mitigating the sanction to a suspension. The length of the suspension is intended to allow Respondent time to seek appropriate treatment and complete his recovery while protecting the public. The Board would like Respondent to understand that mitigation from disbarment is not to be taken lightly and that the sanction in this matter is a close question.

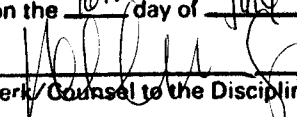
Dated this 16th day of July, 2012

ATSD to:  
[Redacted]  
[Redacted]  
[Redacted]  
Clyde Wickersham@no-mail.com

  
Thomas A. Waite  
Disciplinary Board Chair

**CERTIFICATE OF SERVICE**

I certify that I caused a copy of the DD Order Amending the Decision  
to be delivered to the Office of Disciplinary Counsel and to be mailed  
to Clyde Wickersham Respondent/Respondent's Counsel  
at 1707 E. Lake Street, SE, Renton, WA 98057 by Certified/first class mail,  
postage prepaid on the 16th day of July, 2012

  
Clerk/Counsel to the Disciplinary Board